

# **November 19, 2014 Fairness Hearing Demonstrative Slides Presented By Counsel for the Morey Objectors**

*In re NFL Concussion Injury Litigation,*  
No. 2:12-md-2323 (E.D. Pa.)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

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IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

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No. 2:12-md-02323-AB  
MDL No. 2323

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Plaintiffs,

v.

National Football League et al.

Defendants.

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Civil Action No. 2:14-cv-00029-AB

## Objections to Class Action Settlement

## Denial of Final Approval Is Appropriate Where:

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“[T]he settlement treats ‘similarly situated class members differently’”

OR

“[T]he settlement releases ‘claims of parties who received no compensation in the settlement’”

*Ehrheart v. Verizon Wireless*, 609 F.3d 590, 604 (3d Cir. 2010)  
(quoting Manual for Complex Litigation, Fourth, § 21.61)

# Class Action Settlement Agreement

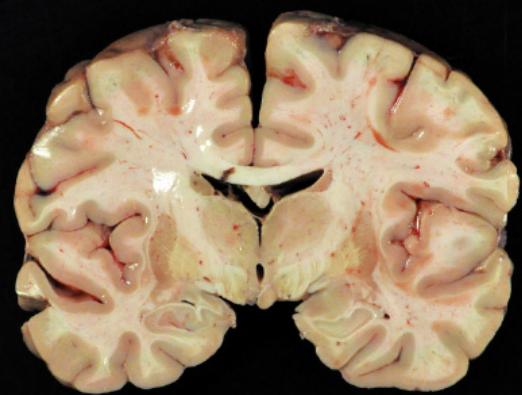
## Section 18.1 Releases

(a) ...

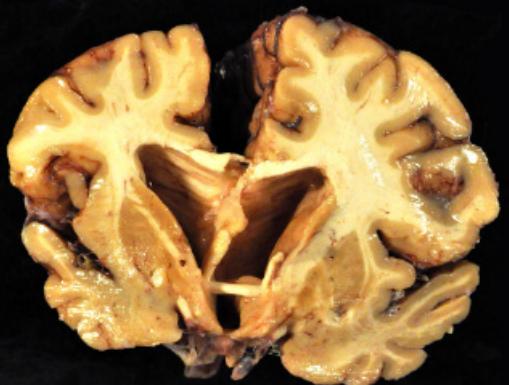
hereby waive and release, forever discharge and hold harmless the Released Parties, and each of them, of and from any and all past, present and future claims ...

(ii) arising out of, or relating to, head, brain and/or cognitive injury, as well as any injuries arising out of, or relating to, concussions and/or subconcussive events ...

(iv) arising out of, or relating to, CTE; and/or



Healthy Brain



Brain Diseased  
With CTE

## What is CTE?

Progressive degenerative brain disease

In people who suffered repetitive brain trauma (concussive and sub-concussive)

Objectors' Experts      Agreed

Dr. Gandy Decl. ¶ 4      Dr. Hovda (Class Cnsl.) Decl. ¶ 19

# What is CTE?

A brain with CTE shows **tau tangles** in certain locations and patterns

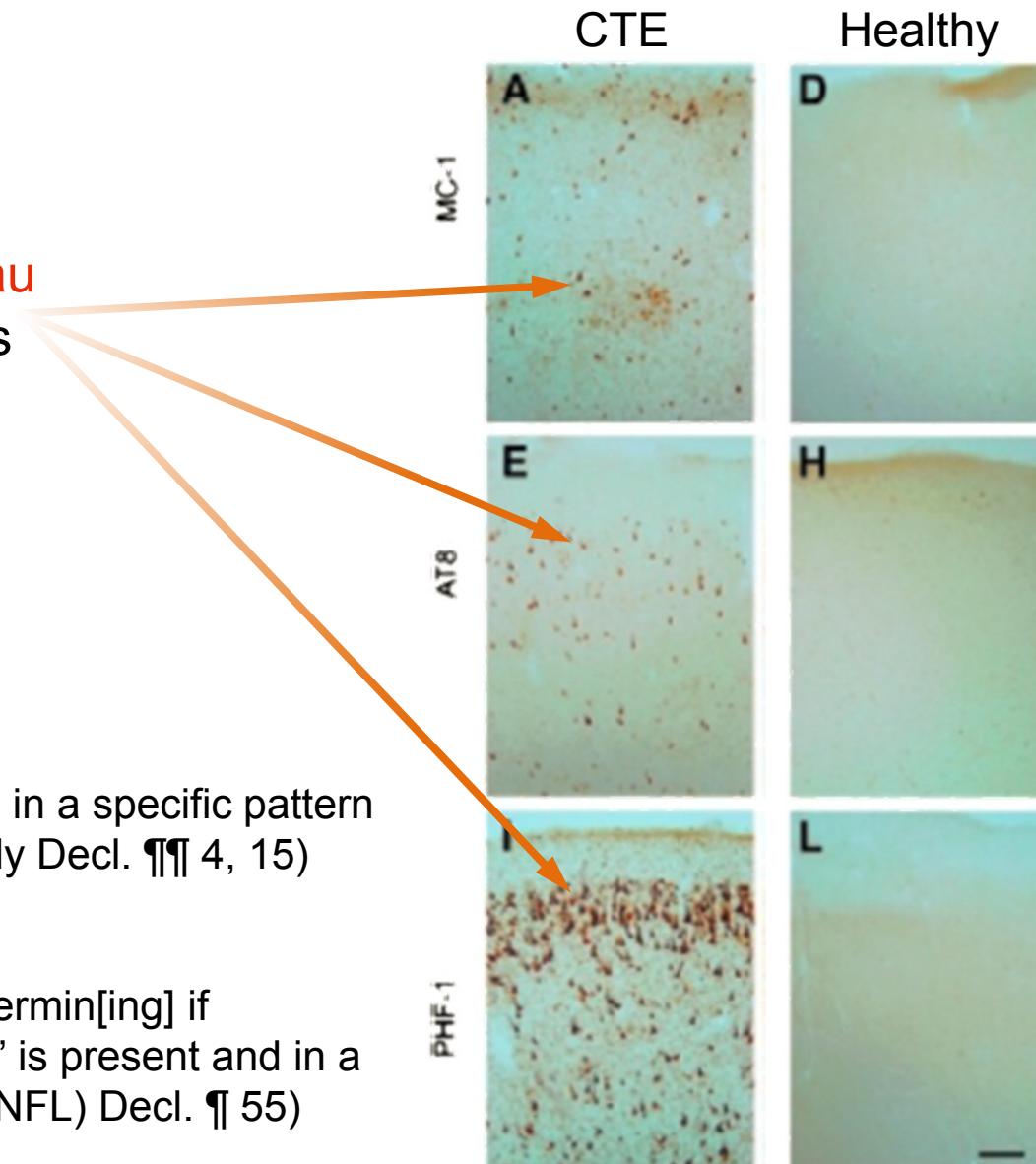
A healthy brain does not

## Objectors' Experts

Tau protein builds up in the brain in a specific pattern that is unique to CTE. (Dr. Gandy Decl. ¶¶ 4, 15)

## Agreed

Scientists diagnose CTE by “determin[ing] if something called the ‘tau protein’ is present and in a particular pattern....” (Dr. Yaffe (NFL) Decl. ¶ 55)



## What is CTE?

In contrast to Alzheimer's, Parkinson's, and ALS, CTE *requires* repetitive head trauma

*“The Industrial Disease of Football”*

Objectors' Experts  
Dr. Gandy Decl. ¶ 4

Agreed  
Dr. Hovda (Class Cnsl.) Decl. ¶ 19

## What is CTE?

*definitive diagnosis - post mortem  
(but lack of precision in diagnosing other  
neurological diseases in the living)*

Objectors' Experts

Dr. Stern Decl. ¶ 36

Dr. Gandy Decl. ¶ 15

Agreed

Dr. Schneider (NFL) Decl. ¶¶ 22, 42

## What is CTE?

Within the next five to ten years, there will be highly accurate, clinically accepted methods to diagnose CTE during life

Objectors' Experts

Dr. Stern Decl. ¶ 38

Agreed

Dr. Hovda (Class Cnsl.) (quoted in Jane Leavy, *The Woman Who Would Save Football*, Grantland (Aug. 17, 2012), <http://grantland.com/features/neuropathologist-dr-ann-mckee-accused-killing-football-be-sport-only-hope>)

# What is CTE?

| <b>STAGE I</b>                      | <b>STAGE II</b>   | <b>STAGE III</b>   | <b>STAGE IV</b>   |
|-------------------------------------|---|--|---|
| Short-term memory difficulties      | Short-term memory loss<br>Executive dysfunction                   | Memory loss with mild dementia<br>Executive dysfunction  | Severe memory loss with dementia<br>Executive dysfunction                               |
| Executive dysfunction               | Loss of attention and concentration                               | Loss of attention and concentration  | Profound loss of attention and concentration  |
| Loss of attention and concentration | Explosivity / aggression  | Explosivity / aggression   | Explosivity / aggression  |
| Explosivity / aggression            | Suicidality   | Suicidality  | Suicidality   |
| Suicidality                         | Headaches   | Headaches  | Depression  |
| Headaches                           | Mood swings or depression<br>Impulsivity<br>Language difficulties | Mood swings or depression<br>Impulsivity<br>Language difficulties<br>Visuospatial difficulties<br>Apathy | Impulsivity<br>Language difficulties<br>Visuospatial difficulties<br>Apathy<br>Paranoia |

Source: McKee et al. 2013 (Nitz Decl. Ex. 5)

# NFL Causes CTE: Class Allegation

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## **The NFL Knew the Dangers and Risks Associated with Repetitive Head Impacts and Concussions**

89. For decades, the NFL has been aware that multiple blows to the head can

lead to long-term brain injury, including but not limited to memory loss, dementia, depression,  
and CTE and its related symptoms.

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS INJURY LITIGATION

Kevin Turner and Sha  
on behalf of themselves  
others similarly situat  
Plaintiffs,

v.  
National Football League and  
NFL Properties, LLC,  
successor-in-interest to  
NFL Properties, Inc.,  
Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**PLAINTIFFS' CLASS ACTION COMPLAINT**

## NFL Causes CTE: Science



2013 Published Study in BRAIN Journal  
**34 of 35** deceased professional  
players diagnosed with **CTE**

2014 Research Update  
**76 of 79** deceased NFL  
players diagnosed with **CTE**

## NFL Causes CTE: Opinion of Class Counsel

**SEEGERWEISS LLP**

Call Us Toll Free:  
**888-584-0411**

HOME

OUR FIRM

Multiple medical studies have found direct correlation between football concussions and suffering from symptoms of chronic traumatic encephalopathy, also known as CTE. CTE is believed to be the most serious and harmful disease that results from NFL and concussions. CTE is a progressive

### Up-to-Date Information on NFL Football Concussions

After years of denying the scientific evidence that links repeated football concussions with long-term brain damage, the NFL is currently in the hot seat. A flood of multi-district NFL lawsuits are finally making this powerful organization take notice.

As Plaintiffs' Co-Lead Counsel, we deeply care about this topic—and about keeping the public up-to-date on the latest findings and pursuit of justice. We encourage those of you who would like to simply stay abreast of this volatile topic or those who want helpful information for a possible lawsuit, to bookmark this page.

football  
from a  
concussion-related disease?

### Free Case Evaluation

Recipient of The National Law Journal's  
Plaintiffs Hot List

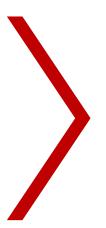
*Post-July 7, 2014 Award For CTE* → \$0

Seeger Decl. ¶ 37  
NFL Brief p. 78

# Compensation for Dementia ≠ Compensation for CTE

Death with CTE  
Before July 7, 2014

CTE  
Stage 1  
Stage 2  
Stage 3  
Stage 4



\$4 million

Death with CTE  
On or After July 7, 2014

CTE  
Stage 1  
Stage 2  
Stage 3  
Stage 4



\$0



Claims  
Process

– ? – Dementia 1.5 → \$1.5 million

– ? – Dementia 2.0 → \$3 million

# INTRACLASS CONFLICT

## Denial of Final Approval Is Appropriate Where:

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Class representatives fail to “fairly and adequately represent the interests of the class.”

Fed. R. Civ. P. 23(a)(4)

The “linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class.”

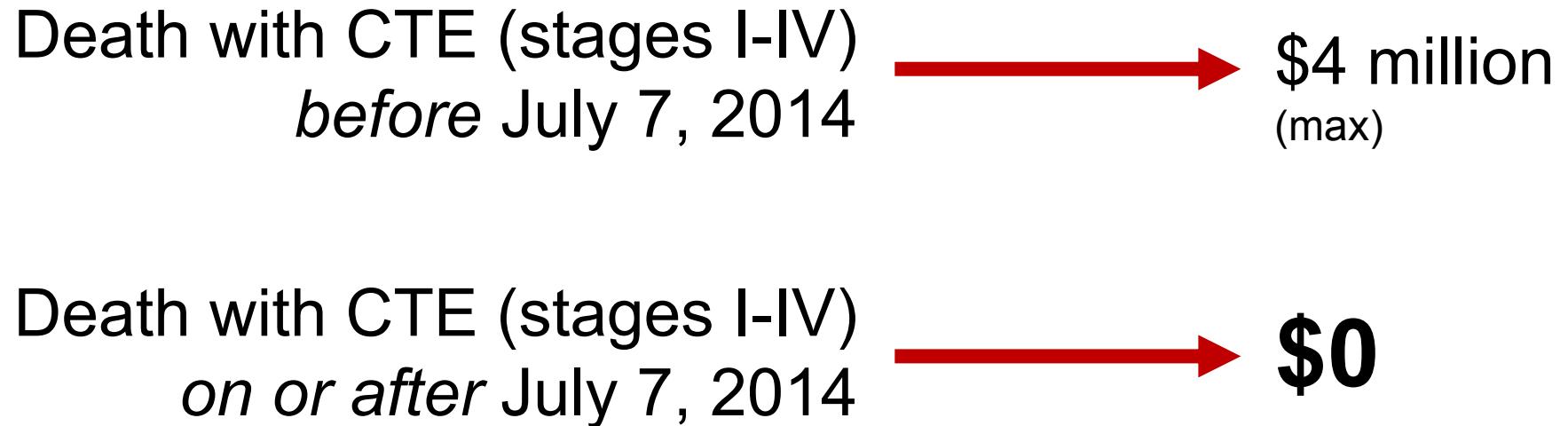
*Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183 (3d Cir. 2012)

## Representative plaintiffs do not allege:

- ▶ Have or at risk of having CTE
- ▶ Played in NFL Europe
- ▶ Subject to TBI/Stroke Set-Offs

## Rights bargained away

## Intraclass Conflict: Unequal Compensation for Equal Condition – CTE



# Intraclass Conflict: Unequal Compensation for Equal Exposure – NFL Europe

Operated by NFL 1991-1992, 1995-2007

Same rules

Same equipment

Same players



Morey Declaration  
Heimburger Declaration

## Intraclass Conflict: Unequal Compensation for Equal Exposure – NFL Europe



3+ Games on Active Roster → 1 Eligible Season

8+ Games on Developmental Squad → 0.5 Eligible Season



10 Game Season → 0 Eligible Seasons

Both NFL and NFL Europe players release all claims

# Intraclass Conflict: Unequal Compensation for Equal Exposure – NFL Europe

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION LITIGATION

Kevin Turner and others similarly situated, on behalf of themselves and others similarly situated, Plaintiffs,  
v.  
National Football League Properties, successor-in-interest to NFL Properties, Defendants.

THIS DOCUMENT APPLIES TO ALL ACTIONS

16. ... I also asked that counsel explain the rationale underlying the treatment of seasons played by class members in NFL Europe. I believe as well that the parties should consider modifications to the settlement agreement to address the NFL Europe issue.

93. Several objectors complain that the settlement does not include time in NFL Europe in calculating eligible seasons for monetary awards.<sup>140</sup> It is my belief that the parties should consider modifications to the settlement to address this issue.

**DECLARATION OF ROBERT H. KLONOFF RELATING TO THE PROPOSED CLASS SETTLEMENT IN THE NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION**

Klonoff (Class Cnsl.) Decl. ¶¶ 16, 93

# NOTICE

## Class Counsel's Notice Statistics Are Misleading

**78% of the 65,000 people who visited the website looked only at the first page**

The average viewer looked for **a minute or less**

Brown Decl. Attachment 7



**NFL Concussion Settlement**  
All Valid Claims of Retired NFL Football Players to be Paid in Full for 65 Years  
Monetary Awards, Baseline Medical Exams and Other Benefits Provided

The NFL and NFL Properties have agreed to a class action Settlement with retired players who sued, accusing them of failing to warn of and hiding the dangers of brain injury associated with playing football. The Settlement does not establish any wrongdoing on the part of the NFL or NFL Properties.

Who is included in the Settlement?

What does the Settlement provide?

What does the Settlement provide?

How do I register?

You will receive a Settlement check or phone the registration number.

Retired playing careers? What about you?

All your rights are protected.

benefits under the Settlement. If you stay in the Class, you may object to the Settlement by October 14, 2014.

The Court will hold a hearing on November 19, 2014 to consider whether to approve the Settlement. You do not have to attend. However, you and/or your own lawyer may attend and request to speak at the hearing at your own expense. At a later date, the attorneys will ask the Court for an award of attorneys' fees and reasonable costs. The NFL and NFL Properties have agreed not to oppose or object to the request if the request does not exceed \$112.5 million. The money would be paid by the NFL and NFL Properties in addition to the payments described above.

Please Share this Notice with Other Players and Their Families

For More Information and to Register for Benefits:  
1-855-957-3485 or [www.NFLConcussionSettlement.com](http://www.NFLConcussionSettlement.com)

# Short Form Notice

# Long Form Notice

**NFL Concussion Settlement**  
Benefits and Legal Rights

## 14. WHAT DIAGNOSES QUALIFY FOR MONETARY AWARDS?

Monetary awards are available for the diagnosis of ALS, Parkinson's Disease, Alzheimer's Disease, Level 2 Neurocognitive Impairment (i.e., moderate Dementia), Level 1.5 Neurocognitive Impairment (i.e., early Dementia) or Death with CTE (the "Qualifying Diagnoses"). A Qualifying Diagnosis may occur at any time until the end of the 65-year term of the Monetary Award Fund.



# Long Form Notice

| QUALIFYING DIAGNOSIS   | MAXIMUM AWARD AVAILABLE |
|--|-------------------------|
| Amyotrophic lateral sclerosis (ALS)                            | \$5 million             |
| Death with CTE (diagnosed after death)                         | \$4 million             |
| Parkinson's Disease  | \$3.5 million           |
| Alzheimer's Disease  | \$3.5 million           |
| Level 2 Neurocognitive Impairment<br>(i.e., moderate Dementia) | \$3 million             |
| Level 1.5 Neurocognitive Impairment<br>(i.e., early Dementia)  | \$1.5 million           |



## Christopher Seeger Quotes

“CTE is not a relevant marker for anything in this settlement. It’s the symptoms — if you have all the symptoms that are related to CTE, or the diseases that are related, like dementia and Alzheimer’s and ALS, then that determines it. . . . If a player thinks he has any symptoms of it, that’s the very reason to stay in the deal.”

Christopher Seeger quoted in  
SportingNews (July 14, 2014)

# Class Confusion: Eric Williams' Objection

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7/3/2014  
National Football League Players'  
Concussion  
No. 2:12-md-

**Age 50**  
2012: UCLA  
• Diagnosed with CTE. Subject NFL4

Honorable J.  
My name is E.  
years for the  
and played there, another four years, an injury caused me to retire in 1984.

I'm guessing  
Because, six  
uniqueness;  
(UCLA: NFL)

The reason I  
NFL, neuroc  
agreement s  
questions, no  
give this prop

Medical His

Before Age  
2000:  
• Diagn

2008 NFL  
• Award  
disabi

**CTE**

- Players diagnosed with CTE (living) today, have to kill themselves or die for their family to ever benefit.
- In my case, based upon all my other reports. There is an overwhelming chance, my family have a lifetime of medical bills, including long term care, on its horizon. But the only time the family can get relief is after I'm dead?.

RECEIVED  
R 7/3/2014  
By [Signature]

## Proposed Revisions for a Fair and Adequate Settlement

### NOTICE

Re-notice class with clear, consistent, and accurate language

### NFL EUROPE

Give credit for play

### NON-NFL TBI/STROKE OFFSETS

Reduce to a reasonable, evidence-based percentage

### CTE

Include compensation for **CTE** for death after July 7, 2014

Include compensation for **CTE** while living once reliable tests are developed

Treat all symptoms of **CTE** – stages I - IV

Or – eliminate **CTE** from the release



## Impediments to Fair Recovery

- ✗ Opt in within 180 days
- ✗ Baseline Assessment Program test within two years
- ✗ Claim Package within two years of receiving a qualifying diagnosis
- ✗ Asymmetric appeals process

## The Baseline Assessment Program

Capped at \$75 million

Ends in 10 years, subject to a 5-year extension

Does not compensate CTE

Class Cnsl. Br. (p. 70): "main goal" of BAP to provide baseline assessments, not provide medical treatment

## Impediments to Fair Recovery

- ✗ Opt in within 180 days
- ✗ Baseline Assessment Program test within two years
- ✗ Claim Package within two years of receiving a qualifying diagnosis
- ✗ Asymmetric appeals process

## Proposed Revisions for a Fair and Adequate Settlement

Lift the cap on the BAP

Extend the BAP to the full term of the Settlement

Eliminate the opt-in requirement

Make it easier to get a qualifying diagnosis

“Even up” the appeal process



**BASELINE NEUROPSYCHOLOGICAL TEST BATTERY AND SPECIFIC IMPAIRMENT  
CRITERIA FOR RETIRED NFL FOOTBALL PLAYERS**

**Section 1. Test Battery**

|  |   |
|--|---|
| <b>Estimating Premorbid Intellectual Ability</b>     | <b>Learning and Memory (6 scores)</b>         |
| ACS Test of Premorbid Functioning (TOPF)             | WMS-IV Logical Memory I                       |
| <b>Complex Attention/Processing Speed (6 scores)</b> | WMS-IV Logical Memory II                      |
| WAIS-IV Digit Span                                   | WMS-IV Verbal Paired Associates I             |
| WAIS-IV Arithmetic                                   | WMS-IV Verbal Paired Associates II            |
| WAIS-IV Letter Number Sequencing                     | WMS-IV Visual Reproduction I                  |
| WAIS-IV Coding                                       | WMS-IV Visual Reproduction II                 |
| WAIS-IV Symbol Search                                | <b>Language (3 scores)</b>                    |
| WAIS-IV Cancellation                                 | Boston Naming Test                            |
| <b>Executive Functioning (4 scores)</b>              | Category Fluency (Animal Naming)              |
| Verbal Fluency (FAS)                                 | BDAE Complex Ideational Material              |
| Trails B   | <b>Spatial-Perceptual (3 scores)</b>          |
| Booklet Category Test                                | WAIS-IV Block Design                          |
| WAIS-IV Similarities                                 | WAIS-IV Visual Puzzles                        |
| <b>Effort/Performance Validity (8 scores)</b>        | WAIS-IV Matrix Reasoning                      |
| <i>ACS Effort Scores</i>                             | <b>Mental Health</b>                          |
| ACS-WAIS-IV Reliable Digit Span                      | MMPI-2RF                                      |
| ACS-WMS-IV Logical Memory Recognition                | Mini International Neuropsychiatric Interview |
| ACS-WMS-IV Verbal Paired Associates Recognition      |   |
| ACS-WMS-IV Visual Reproduction Recognition           |   |
| ACS-Word Choice                                      |   |
| <i>Additional Effort Tests</i>                       |   |
| Test of Memory Malingering (TOMM)                    |   |
| Medical Symptom Validity Test (MSVT)                 |   |

## Deficiencies with the Test Battery

“The specific tests selected, and the length of the battery would not be consistent with that given by the large majority of neuropsychologists who specialize in neurodegenerative disease ...”

Dr. Stern Decl. ¶ 43

“... the criteria used in the Settlement could require that the [player’s] test performance be even more impaired than what is often seen in well-diagnosed cases of moderate stage dementia.”

Dr. Stern Decl. ¶ 50

## Proposed Revisions for a Fair and Adequate Settlement

Adopt appropriate testing procedures that accurately reflect the extent of injury

Ability to revise test battery as experience using it builds

Use existing NFL tests of player IQ prior to joining NFL

